Published January 10, 1894.

Supreme Court Syllabi

6971.

Abram Coffelt vs. The First National Bank of Holton, Kansas.

Error from Jackson County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J.

If the acts or statements of a person are not done or made for the purpose of influencing the conduct of a third party, and such third party has not relied upon the same, or been induced thereby to enter upon a course of action resulting to his injury, no estoppel arises in his behalf.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

8746.

Joseph L. Sheldon and Lizzie S. Sheldon vs. Simon Pruessner, Lewis M. Motter, Henry S. Pruessner and Lizzie Pruessner.

Error from the Circuit Court of Shawnee County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J.

1. The courts, in the due administration of justice, will not enforce a contract in violation of law, or permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded.

2. Where a mortgagee, residing in this state, owns and has in his possession a note for $1700, secured by a mortgage upon real estate, in this state, and pretends to transfer by merely endorsing his name thereon, but without actually delivering the same, such note and mortgage to his father in another state, without any demand being made upon him to do so, to secure $450.00 and interest for prior borrowed money, but really for the purpose of evading the payment of taxes justly due to the state: *Held*, That in an action brought in the name of the father to recover upon the note and mortgage, the mortgagee, on account of his acts in evading the payment of taxes and thereby defrauding the revenues of the state, cannot have any recovery in the name of his father or otherwise on any part of the note or mortgage belonging to him: *Held, also*, That if the father did not have any knowledge of such alleged transfer, and his name is used to collect such note and mortgage without his consent, or if he merely accepted the note and mortgage as a *particeps criminis* to defraud the revenue laws, no recovery of any amount thereon can be had in his name.

3. Where a husband and wife jointly convey a homestead in exchange for other real estate to be occupied by them as a new homestead upon which there is a prior mortgage, and the husband, with the consent of the wife, takes the conveyance of such real estate in his own name, and expressly assumes the payment of the mortgage thereon, the wife cannot, in an action to foreclose the mortgage, defend against it upon the ground that the real estate so purchased is a homestead, and therefore that the prior mortgage thereon at the date of the exchange is null and void.

4. Where a higher rate of interest is expressly reserved to be paid after maturity, such amount is recoverable, if not prohibited by statute.

5. Where a judgment is rendered upon two different notes, and for the foreclosure of two different mortgages given to secure the same, one in favor of the plaintiff, and one in favor of a co-defendant, and the judgment on the note and the foreclosure of the mortgage in favor of the plaintiff are erroneous for want of sufficient evidence. It is error for the trial court to provide that in the decree that upon the sale of the real estate all of the costs involved in the case, including the costs taxed upon the erroneous judgment, shall be first paid from the proceeds of such sale.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6966.

St. Louis & San Francisco Railway Co. vs. Elizabeth Hurst and Alfred Hurst

Error from Cowley County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON C. J.

1. An appeal from the judgment of a justice of the peace is complete upon the filing and approval of the appeal bond or undertaking within ten days from the rendition of the judgment.

2. The successor of a justice of the peace has the power under the direction of the district court to supply omissions in a transcript of his predecessor, and for that purpose may file with the clerk of the district court a new and completed transcript from the official records in his possession.

3. Where an appeal bond filed and approved by a justice of the peace is insufficient in form or amount, the party appealing should be given an opportunity by the district court, where the appeal is pending, to change or renew the bond before the case is dismissed for a defect therein.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6954.

S. G. Bigelow vs. D. Wygal, et al.

Error from Miami County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

Where a jury are correctly instructed by the trial court upon all the law questions involved in the case, and the court in addition gives a slightly contradictory instruction which clearly appears from the special findings of the jury not to have misled them, such additional instruction will not, under the circumstances, entitle the defeated party to a new trial.

All the justices concurring.
A true copy.
Attest: C. J BROWN,
[SEAL] Clerk Supreme Court.

6843.

The Kansas City & Pacific Railroad Company vs. William Ryan.

Error from Miami County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J.

1. Between the railroad company and its employes, the railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its road. A. T. & S. F. Rld. Co. v. Wagner, 33 K. 660.

2. It does not necessarily follow that the special inspection given by a manufacturer, or in a repair shop by the expert iron workers therein employed to discover any latent or concealed defect in a tool or instrument for use, like a lifting jack, before the same is sent out for sale, or use, is demanded by railroad companies, bridge-builders, house-raisers or other persons using such a tool in their work, but, of course, a railroad company and every other person is liable for injuries to their employes from a defect in their tools and other appliances used in their work, when such defect is visible or known, or might have been known by the exercise of reasonable and ordinary care and diligence.

3. If a railroad company purchases an ordinary tool or implement, like a lifting jack, of a well known and reliable dealer in such tools, and at the time of the purchase there is a latent or concealed defect therein, consisting of a defective weld of the foot attached to the jack, which is not visible, yet if after use thereof by the railroad company, such jack, on account of its cogs being worn or broken, is sent in for repairs to the railroad shops of the company, and if in repairing the jack, it was, or ought to have been the practice at the shops, before the jack is sent out again for use, to examine and inspect all its parts to ascertain if any other defects exist necessary to be repaired, and any reasonable examination or inspection by the iron workers at the shops would have disclosed the defective weld of the foot of the jack; then the railroad company is negligent in sending out from its own repair shops the jack for use in a defective condition, even if the defect is not visible.

4. Where an important special finding of the jury, which would of itself be sufficient to sustain a verdict and judgment, is wholly unsupported by any evidence, and such special finding is the probable support for other important and material findings, and the verdict is against the great preponderance of the evidence, it is clear that the case was unfairly tried and that a new trial should be granted.

Johnston, J. concurring.
Allen, J. dissenting.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9300.

M. A. Pounds vs. A. K. Rogers, Treasurer of Shawnee County, et al.

Original Proceeding in Mandamus.

WRIT REFUSED.

SYLLABUS. BY THE COURT. HORTON, C. J.

1. All matters relating to the sale and conveyance of land for taxes under any prior statute shall be fully completed according to the laws under which they originated, the same as if such laws remained in force. Parg. 7010, Gen. Stat. 1889; section 155; chap. 34, laws of 1876; section 143, Ch. 107, Gen. Stat 1868.

2. The sale of land for delinquent taxes, under the statute constitutes a contract between the purchaser and the state—the terms of which are found in the law then in force.

3. On September 1, 1893, the owner tendered to the county treasurer the amount for which the land was sold, with interest at the rate of twenty-four per cent. from the date of sale to the 18th day of May, 1893, the day on which chapter 110, of the laws of 1893 (reducing the interest payable on redemption, to fifteen per cent.), went into effect, and interest from May 18, 1893, to Sept. 1, 1893, at the rate of fifteen per cent.; also the amount of half tax of 1892, paid by the purchaser June 21, 1893, with interest from the latter date to the time of tender, at the rate of fifteen per cent. *Held*, That the tender was insufficient—*and further held* that to redeem said land the amount for which the land was bid off, and all the subsequent taxes, paid by the purchaser thereon, with interest at the rate of twenty-four per cent. per annum on the taxes and charges from the date of sale, and the same interest on all subsequent taxes so paid by the purchaser from the date of payment must be paid or tendered.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9139.

The State of Kansas vs. L. R. Yates.

Appeal from Brown County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J.

1. The rule is that where a defendant has pleaded guilty in a criminal cause and sentence has been passed upon him, it is within the sound discretion of the trial court to permit the plea to be withdrawn, and to allow a plea of not guilty entered. If the court abuses its discretion, error may be assigned therefor.

2. Where a defendant, being an intelligent person and the owner of a drug store, was charged with an offense under the prohibitory liquor law, punishable by a fine of not less than $100 or more than $500, or by imprisonment in the county jail not less than thirty days or more than six months, and was represented in court by able counsel; and upon arraignment plead guilty and was sentenced to pay $300 fine and the costs, and also to be committed to the county jail until the fine and costs were paid; and the next day presented his motion to the court to retract his plea of guilty upon the ground of the misconduct of the prosecuting attorney in inducing him to enter a plea of guilty under the belief that he would be sentenced to pay a fine of $100 only, and upon the hearing of the motion it was shown that no definite promise was made by the county attorney to the defendant or his attorneys, or to anyone for him, and that such attorney did not urge the defendant or his attorneys to enter a plea of guilty, but that from an interview between the county attorney and one or two of the friends of the defendant it was understood by them and so communicated to the defendant that if he plead guilty he would be sentenced to pay a fine of $100 only. *Held*, The refusal to permit the defendant to withdraw his plea was not an abuse of sound discretion of the trial court.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6956.

F. R. Newberry and Charles P. Noell vs. The Arkansas, Kansas & Colorado Railway Company.

Error from Ford County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. A ruling quashing the summons and setting aside the service made upon the defendant is a final order which is reviewable in the supreme court.

2. Such a ruling is not available as error where more than one year has intervened between the making of the order and the commencement of proceedings in error.

3. An action against a railroad company for injury to property upon the road or line of the company may be brought in any county through or into which the road passes; and when rightly brought the summons may be issued to any other county of the state and there served upon the president of the company.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9121.

Joseph L. Sheldon and Lizzie S. Sheldon vs. Simon Pruessner, Lewis M. Motter, Henry S. Pruessner and Lizzie Pruessner.

Error from Shawnee County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. Greenwood v. Butler, 52 Kas. followed.

2. Where land is advertised to be sold for cash in pursuance of a judgement of foreclosure, and the sheriff accepts a certified check as cash, which is afterward paid, the acceptance of the certified check for cash is not of itself a sufficient reason to defeat the sale.

3. Where a judgment under which land has been sold is held to be erroneous and is reversed, and it appears that the land was bid in at the sale by a third person who was acting for and in behalf of the judgment creditor, and that the purchase was actually made for such judgment creditor, the purchaser is not entitled to the protection provided for in section 467 of the civil code. The reversal of the judgment defeats the title of the purchaser and the sale should be set aside.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6974.

Newton Kreamer and David J. Matter vs Sarah Kreamer.

Error from Jewell County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

Where an executor who is a residuary legatee executes a bond to pay all the debts and legacies of the testator, he and the sureties become absolutely liable to the extent of the penalty of the bond for all debts and legacies, regardless of the amount or value of the assets of the estate; and where a specific legacy is not paid when due, the legatee may, without obtaining an order of allowance by the probate court, and upon demand and refusal of payment, maintain an action for the recovery of such legacy against the obligors of the bond.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6976.

Martin Brooks and James Brooks, heirs of Calvin K. Brooks, deceased, vs. Silas N. Brooks, administrator of the estate of Calvin Brooks, deceased.

Error from Rooks County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. The claim of a creditor against an estate was duly allowed and ordered to be paid by the probate court, but the probate judge neglected to make a complete entry of the allowance and order of payment. After payment had been made and another probate judge had succeeded to the office it was discovered that no entry had been made of the order. Upon motion a *nunc pro tunc* order was made authorizing the entry of the allowance and order for payment which had been made by the former probate judge. *Held* That there was power in the court to correct the records so that they should speak the truth.

2. The evidence examined and found to be sufficient to sustain the finding and judgment of the court.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6967.

The First National Bank of Cobleskill, New York, vs. David Emmitt.

Error from Saline County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. The plaintiff, being in possession of a negotiable note, properly indorsed, it will be presumed that he owns and acquired the note in good faith, for full value in the usual course of business, before maturity, without notice of any circumstance that would impeach its validity; and where the defendant who is the maker of the note, claims that the plaintiff does not so hold it, it devolves upon him to prove his claim.

2. The evidence examined and held to be insufficient to sustain the finding that the holder was not an innocent purchaser of the note in suit.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9316.

The Union Terminal Railroad Company vs. the Board of Railroad Commissioners of the State of Kansas.

Error from Shawnee County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

The board of railroad commissioners in pursuance of chapter 184 of the laws of 1887, upon the application of a railroad company granted it the right to cross the roads of two other railway companies and prescribed the terms and manner of crossing, and also fixed the compensation to be paid by the crossing company. No appeal was taken from the order. At the end of about four months, and before the crossing was made, the companies over whose roads the crossing was allowed applied to the board of railroad commissioners for a rehearing of the case and to set aside the order allowing the crossing to be made. The crossing company objected to the consideration of the application, claiming that the board had no power to grant a re-hearing. The objection was overruled and the board was proceeding to re-hear the case when an action for injunction was begun against the board alone to enjoin it from further hearing the application. *Held*, That the railroad commissioners are only nominal parties, that the railroad companies who are invoking the action of the board and whose rights will be seriously affected by the action which the board may take are necessary parties, and that no injunction should be allowed until they are brought into court and given opportunity to be heard.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9321.

In re H. W. Lewis.

Original proceeding in habeas corpus.

PETITIONER REMANDED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. Under the fifth subdivision of section 354 of the civil code a receiver may be appointed at the suit of a stockholder where the business and affairs of a corporation have been so mismanaged that it has become insolvent, and where it is made to appear that all the officers and directors of the same have conspired together to divert its business to another company, dissipate its funds, and fraudulently absorb and apply its assets to the individual benefit of such officers.

2. In such a case the property and assets of the corporation may be placed in the hands of a receiver to be preserved and rightfully applied under the supervision of the court, and it may be restored to the officers when there has been a change of management or when it is deemed by the court to be prudent and safe to restore the property and affairs of the corporation to its duly constituted officers.

All the justices concurring.
A true copy.
Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9204

The Board of County Commissioners of the County of Graham vs. B. Van Slyck, Jerome Shoup and William Wells.

Error from Graham County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. Under the general statute relating to fees and salaries county clerks are entitled to no more compensation than the salaries fixed by law; and all fees received by them for official services should be accounted for and deducted from each quarterly allowance of salary.

2. A cause of action for fees not accounted